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## THE FIRST ENGLISH COURT IN (THE PRESENT) CANADA ON ITS CRIMINAL SIDE.

WILLIAM RENWICK RIDDELL.<sup>1</sup>

On an arm on the east coast of the Bay of Fundy, where the Annapolis River empties into the salt waters, stands Annapolis, a small town of about a thousand inhabitants. No one from its present appearance would think that for thirty years it was the capital of a territory larger than the British Isles; but so it was. Founded by the French in 1604 and called by them Port Royal, it was captured by the British in 1710, and finally ceded in 1713 by the Treaty of Utrecht. They named the town Annapolis Royal, after the Royal Anna then Queen,<sup>2</sup> and made it the capital of their new Province of Nova Scotia.<sup>3</sup>

Nicholson, the first British Governor, was succeeded in 1719 by Colonel Richard Phillips,<sup>4</sup> who was instructed "to choose a council for the management of the civil affairs of the Province from the principal English inhabitants," and until an Assembly could be formed, to regulate himself by the instructions of the Governor of Virginia. In the following April he appointed Councillors, with one exception from the officers of the Garrison or Civil officers of the administration.

There were few English settlers in Nova Scotia. The French (Acadians) were troublesome and the Indians even more so. The

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<sup>1</sup>Justice of the Supreme Court of Ontario, Toronto.

<sup>2</sup>It was of Anne (when a Princess), her husband George of Denmark, her sister Queen Mary and her brother-in-law, King William III, that the wits wrote:

King William thinks all,  
Queen Mary talks all,  
Prince George drinks all  
And Princess Anne eats all.

But Queen Mary did not talk her husband to death; he survived her; and poor George's drinking did not prevent him from making Anne a good husband and becoming by her the father of seventeen children, the longest lived of whom reached the age of twelve years only. Poor Queen Anne! Of all the many who have laughed at her pettiness and silliness, how few have thought of the mother's broken heart. Probably Queen Anne is best remembered from Pope's lines:

"Here, thou Great Anna, whom three realms obey,  
Dost sometimes counsel take and sometimes tea."

<sup>3</sup>"Nova Scotia" included also what is now called New Brunswick, till 1784, when the Province of New Brunswick was divided off. At this time, however, there were no English settlers.

<sup>4</sup>Richard Phillips (or Philips) was born in England in 1661 and entered the army at an early age. He served under William of Orange in the Irish campaign of 1690 and was present at the famous Battle of the Boyne. Afterwards he served in New England. Returning to England he received his commission as Captain-General or Governor of Nova Scotia. He went home in 1722, returning in 1729, and again went to England permanently in 1730; resigning his office in 1749, he died in 1751.

English did not hesitate to charge the French not only with inciting the Indians, which was probably true, but also with teaching them that it was the English who crucified the Saviour—which lacks probability.<sup>5</sup>

“It was a time of peaceful expansion of the British Empire, and the policy of Walpole affected even this remote corner of it. To the careful student, . . . the transactions of a handful of army officers entrusted with the civil administration of a British Province, with an increasing hostile population, alien in speech and race and religion, must always have interest . . . they were careful to do justice and preserve order as far as lay within their power.”<sup>6</sup>

The Council began to sit April 20th, 1720, at His Excellency Colonel Phillips' House. April 19th, 1721, the Governor informed them that he had called them together “to consider of establishing a Court of Judicature to be held for the Province.” He informed them that one Article of his Instructions was to make the laws of Virginia a rule or pattern for this Government where they could be applicable, and that by the laws of Virginia the Governor and Council were the Supreme Court of Judicature. The Council promptly voted that it would be for his Majesty's service as well as very much for the satisfaction of the Inhabitants of the Province that such a Court should be held at Annapolis Royal by the Governor and Council as often as it should be thought necessary; and directed the Clerk to draw up a formal order. On the following day an order was passed, which, after reciting the “dayly cry here . . . for Justice by many of the Inhabitants and residents of this Province by Memorialls, Petition and Complaints to His Excellency the Governor who . . . loaded with more than the common weight of Government has not time and leisure to consider fully of the same without the assistance of Council,” went on to provide that “His Excellency the Governor and Members of his Majesty's Council for this Province hold and keep a Court of Judicature for said Province annually . . . at Annapolis Royal upon the first Tuesday in May, August, November and February yearly and in

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<sup>5</sup>See Haliburton's *Hist. of Nova Scotia*, Halifax, 1829, Vol. 1, p. 101 note.

<sup>6</sup>This quotation is from the preface (by Dr. MacMechan, Archivist of Nova Scotia) to Vol. II of the “Nova Scotia Archives,” from the third volume of which most of the material for this paper is taken. It has always seemed to me that a somewhat close parallel could be drawn between the government by the English of Acadia and the government by the Americans of the Philippine Islands. Perhaps someone better qualified than I will some day draw the parallel—and perhaps the dire misfortunes of the Acadians will not seem so much a reproach to British rule when the parallel is fully worked out.

every year from time to time"—the Governor to make a Proclamation of time and place of sitting as soon as might be.<sup>7</sup>

This was the first English Court of Judicature erected in the territory which is now the Dominion of Canada with nine Provinces and one Territory, each with its Supreme Court (and generally with that name) and its staff of Judges.

After this, the Council sat both as Council and as a Court of Judicature; and there is some difficulty in distinguishing the respective functions. Many civil cases were disposed of, as to title to land, validity of a will, fences, debt, bills of exchange, etc., etc.; but these I do not extract for this article.

There was infinite difficulty with the French and especially the priests; two of the latter on one occasion, when called before the Council, displayed great "Insolence, Called for chairs to sitt Down, saying that they did not Appear as Criminals and that they had no business with things Temporal and further expressed themselves in these words 'Que Nous N'avons point D'ordres à Recevoir jci.' "

With the Indians there was constant trouble; they murdered and ravaged on every opportunity; and at least once the Council had to threaten "to make Reprisalls by the Death of one of the Salvage prisoners in Custody to Deter them from any farther Outrage when they will Ly Under the fear of Loosing Nine more Still left in our possession." But I do not go into these matters; I confine my attention here to the criminal and quasi-criminal cases.

The first criminal case (apparently) to come before the Court was in September 1723, when Prudane Robichau, Sr., came up for trial on a charge of supplying the hostile Indians contrary to the Governor's Proclamation.

It was proved that Robichau had one evening when the sun was about half an hour high gone "Cross a Rod . . . with a Bagg and a Bottle under his arm towards the place where . . . the Enemy Indians were," and that "Some Indians were Discovered with provisions and a Bottle before them which by His Smell" the witness "took to be Rum and that . . . Robichau was Sitting by them." Another witness thought what was in bottle was rum, but did not

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<sup>7</sup>The King's Privy Council at the Common Law exercised "a kind of extraordinary and corrective jurisdiction to prevent violence, corruption or intimidation"—but much jealousy was manifested from time to time at the exercise of this extraordinary jurisdiction. At length an Act was passed, 1487, 3 Henry VII, C. 1, giving a formal status to this Court of Star Chamber. I have in an Address before the Missouri Bar Association, September 1909, given some account of the criminal jurisdiction of the Privy Council. See also "Select Cases in the Star Chamber," Vols. I, II—Selden Society's Publication. Vol. XVI and XXV.

taste it. Robichau stoutly swore that he had no bottle, and that "what he was carrying in the Bagg was only a Hatt, a Shirt and a pair of Stockins" which belonged to a friendly Indian.

"The Honourable Lt. Governour and Council not finding full proof of the Accusation Reprimanded the said Prudane Robichau adviseing him to beware of giving any Such Suspicions of holding Correspondence with any of the Enemy Indians for the future and so Dismissed him."

Other and more pretentious Courts have been equally illogical in rebuking or warning a man found not guilty,<sup>8</sup> and one can hardly avoid the suspicion that Prudane knew more than he told of the "Enemy Indians." (His name was, of course, "Prudent"; but French orthography never was the strong point with Englishmen, home or colonial.)

Even "curing Enemy Indians" who had been wounded, was an offence; and a Surgeon "one Monsr. Mutton," charged with this offence, had to give good security to the Government for his good behaviour.

Some of the troubles of the Court in getting the accused to appear are given in detail. In August, 1724, Lewis Tibeau (I presume, "Thibault") complained of Joseph Brusar (no doubt, "Broussard") for maltreating him. The Governor sent an order to Brusar to appear to answer this complaint. Tibeau endeavouring to serve Brusar with the order, Brusar beat him and tore the order to pieces. The Governor again summoned Brusar to appear. He did not come. Again sent for, he was brought in by his friends, and after examination "put Prisoner upon Guard." Subsequently confessing his fault and promising amendment, he was released with a reprimand.

Robert Nicholes was not so fortunate. He was servant to Lawrence Armstrong, Lieutenant Governor of Nova Scotia during the absence of Phillips; and one day he struck his master. The Council determined to make "An Example of" him and punish him severely "for his Audacious Violence Offered to the Honourable Lt. Gov. of the Province in order to terrifie all Such bold harden'd Villains from Assaulting the Gov. Who Represents his Majesty": and accordingly the following sentence was pronounced:

"The Punishmt. therefore Inflicted on thee is to Sitt upon a

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<sup>8</sup>I myself heard the late Chief Justice of Ontario, the Honourable John Douglas Armour, at the Ottawa Assizes, when an accused was acquitted of a charge of stealing a fur cap, say "Prisoner, the Jury have acquitted you; go home, and take care that you steal no more caps."

The verdict "Not Guilty, but don't do it again," has become a proverb.

Gallowes three Days, half an hour each Day, with a Rope about thy Neck and a paper upon your Breast Whereon shall be Writt in Capitall Letters AUDACIOUS VILLAIN And afterwards thou art to be Whipt at a Carts tail from the Prison up to the Uppermost house of the Cape and from thence back again to the Prison house Receiving Each hundred paces five Stripes Upon your bare Back with a Catt of Nine tails and then thou art to be turn'd over for a Soldier."

The pillory<sup>9</sup> was a punishment awarded for other crimes than striking one's Master. For example: at the April Sitzings, 1731, His Excellency Governor Phillips acquainted the Council of a "Notorious Fraud that had been committed by two Inhabitants," and "it being prov'd upon them" they were "sentenc'd as Follows:" "Viz<sup>t</sup>.—Agreed and Orderd y<sup>t</sup>. Augustine Como & Francis Richards being found Guilty of y<sup>e</sup>. Crime alledg'd against them by His Excelley y<sup>e</sup>. sd Como shall make good his Bargain & stand in y<sup>e</sup> Pilory in y<sup>e</sup>. most publick place in y<sup>e</sup>. Town on y<sup>e</sup>. Next Holy day, dureing one Hour being from Eleven till twelve of y<sup>e</sup> Clock. A. M. & Francis Richards to stand half y<sup>e</sup>. sd time in y<sup>e</sup>. Pilory as afores<sup>d</sup>. that both Como and Richards shall continue in Confinement untill y<sup>e</sup>. sd Sentence shall be fulfill'd & Charges paid."

Whipping was another punishment equally common and probably more effective.

In January 1733 two men "ffrancis<sup>10</sup> Raymond and ffrancis Meuse" were found guilty of crimes—the former of repeated thefts and, with the latter, of chopping down trees on the road. "Whereupon it was agreed (after Some Questions put and Considered) That ffrancis Raymond Should be Whipt at the Carts tail vizt at the Block House, at the ffort Gate, at the Cape and at Mr. Gautiers; and at Each of these places to Recieve five Stripes on his Bare Back with a Cat of Nine Tails; And that ffrancis Meuse Should Receive 40 Stripes at the ffort Gate on his Bare Back with a Cat of Nine Tails; but submitted the inflicting or Remitting the same to his Honours Clemency; and ordered

<sup>9</sup>The Pillory was abolished in England in 1837, by the statute of 1 Vict. C. 23. In Upper Canada it survived till 1841, when it was abolished by the statute 4 and 5 Vict. C. 31. There are many instances in our records of this punishment being imposed. One very celebrated case is mentioned in my article "Early Legislation and Legislators in Upper Canada," Canadian Law Times for March, 1913, (33 Can. L. T. at p. 190.)

<sup>10</sup>Of course the double "ff" was the old way of writing a capital F. This is still affected by some of the name of French, etc.

The "Pistol" to be paid the constable for his prison fee was not a "pistol" according to our present orthography, but a "pistolet." This, a very common denomination of money at the time and for more than half a century later, was 18/6 Halifax Currency, or \$3.70 of our present money (probably equivalent in purchasing value to about \$10 at the present time).

that Francis Raymond Remain in Prison after punishment till he pay the Constable a Pistol for his prison fees; and that Francis Meuse be also Committed till he pay to the Constable a Pistol for his prison fees, and be Bound over in a hundred pound, and also to find two Good Securitys in fifty Pound each for his Good behaviour for a year and a Day; And that both the Said Francis Raymond and Francis Meuse Should Cause the trees Cut down upon the Road to be Removed from off the Same, and brought hither and laid down by the effort, in Such a place as Shall be appointed; and that they Stand Committed till this Sentence be performed."

A like hard fate overtook Peter Guon or Goun for stealing from Stephen Jones. Peter was a Spaniard in the service of John Stickney of Falmouth in New England, and after a constable had searched "for Stollen Goods" was convicted on his own confession. Whereupon it was agreed: "That Peter Guon the spaniard should Receive fifty Stripes at the Carts tail upon his bare Back, from the Mass house to the Cape; And be also bound for the Space and term of three Years to serve him the said Stephen Jones or Assignes towards Recompencing his Other Losses, Costs and Dammages Sustained through the Thefts of him the said Peter Goun to Commence from the Expiration of the time that the said Peter Goun hath Engaged to Serve John Stickney Marriner of Falmouth in Casco Bay in New England, Provided he the said John Stickney Will not Redeem him the Said Peter Goun by paying unto him the Said Stephen Jones the proportion of Dammages Amounting to fifty-six pounds New England money."

I have not met elsewhere the sentence to serve the person from whom the property was stolen until it is paid for by labour; but that practice is an admirable one and might be adopted were it not for the objection in the present age to receive a thief into service.

In August 1734 a complaint was laid by Mary Davis against Jean Picot wife of Lewis Thebauld "for Scandalously Reporting and Accusing her of the Murder of Two Children." Witnesses were examined, and "it was found a vile Malicious Groundless and Scandalous Report and therefore Agreed That Jean Picot the Wife of Said Thebauld Should be Duck'd and that She and Cecil Thompson called by her the Said Picot as a Witness Should be both bound Over to the Peace as the Authors and Spreaders of Said Malicious Scandle and then Ordered that Jean Picot Should be Duck'd on Saturday Next the 10th Instant at High Water."

This seemed a severe punishment; ducking<sup>11</sup> frightened even the prosecutrix and she asked for mercy for her traducer.

"Then at the Request of the Said Mary Davis praying that the Aforesaid Sentence of Ducking may be Reversed And yt She the Said Picot might only be Obligated to ask her pardon on Sunday the 11th. Instant at the Mass house Door Which being Consider'd it was Agreed and accordingly Order'd that She the Said Jean Picot Should publicly beg her the Said Mary Davis's pardon at ye Mass house Door on Sunday the 11th. Instant."

The above are the cases coming before the Council on the criminal side from its organization till August 1736. The civil cases are rather more numerous.

While this the first English Court in our territory did not proceed

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<sup>11</sup>Blackstone (Comm. Vol. IV, p. 168) says: "A common scold *communis rixatrix* (for our law-Latin confines it to the feminine gender) is a public nuisance to her neighborhood, for which offense she may be indicted and if convicted shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory or *cucking-stool*, which in the Saxon language is said to signify the scolding-stool, though now it is frequently corrupted into *ducking-stool*, because the residue of the judgment is that when she is so placed therein she shall be plunged in the water for her punishment."

Murray, with that iconoclastic spirit so common in the modern lexicographer, does not accept Blackstone's derivation, but suggests that the original form was "cuck-stool"—"cuck" being *cacare* (hence it is called in the Chester Domesday "cathedra stercoris"). Alas, old times are changed, old manners gone—and the common scold, the disorderly woman, the dishonest tradesman, need no longer fear the cuckstool.

I do not find that it ever was in use in Upper Canada; perhaps it was not needed. Those interested will find a full account of the history of this form of punishment in Dr. T. N. Bushfield's "Obsolete Punishments." See also the Statute 3 Henry VIII, C. 6, S. 1.

A case in Massachusetts may be mentioned: Eliphalet Bradford Terry, Secretary of the Mayflower descendants of the State of New York, writing in the New York Times, Sunday, November 12th, 1916, and defending the Plymouth Colonists from the charge of witch-hunting, says:

"It is but right, however, to correct the statement that was made by one of them in regard to religious persecutions and trials of witches in Plymouth Colony. There is no record of any persecution for religious reasons in Plymouth Colony.

"Of cases arising from witchcraft there were but two in Plymouth Colony.

"The first case arose in 1661. Dinah, wife of Joseph Sylvester of Scituate, claimed to have seen her neighbor, the wife of William Holmes, in conversation with the devil, who was in the form of a bear.

"The sensible Holmes brought a suit for slander, which was tried by the General Court, Governor Prence presiding. Dame Sylvester described their interview. In most Christian countries Mrs. Holmes's life would not have been worth a day's purchase, but Plymouth showed a degree of common sense altogether novel in such cases.

"Dame Sylvester was declared guilty of slander, and was ordered to be publicly whipped, or to pay Mr. Holmes £5; or that she openly confess her slander and repay Holmes's costs and charges. That she chose to do the latter is no more remarkable than that the result discouraged witch-searching for many years."

The second case resulted in an acquittal.



on strictly legal lines, it seems to have done substantial justice, employing a jurisprudence suited to the place and times.

Perhaps the fact will not be too much pressed against them that some of the Council in November, 1734, "presented his Honour with a memoriall in behalf of themselves & others . . . to be Sharers in some Mines discovered in the Province, as a Recompence of their many years Service at this Board," for among the Patentees for Mines in the Province there were in addition to the Councillors, His Excellency Governor Phillips and Lt. Governors Armstrong and Cosby, also men of such high rank as Sir Robert Walpole, the Duke of Newcastle, the Duke of Chandos, Lord Harrington, Horatio Walpole, Henry Pelham, &c., &c. It was the age of colossal and unblushing graft.